

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MARCELLA ROSE, an individual,

Plaintiff,

v.

SEAMLESS FINANCIAL
CORPORATION INC., a Nevada
Corporation; MICHAEL MCDEVITT,
an individual; CHAD HAGOBIAN, an
individual; JEAN-PIERRE RADTKE,
an individual; PREMIERE CAPITAL
ESCROW, INC., a California
corporation; LUIS ANTONIO
VENEGAS, an individual; and DOES
1-100,

Defendants.

Civil No. 11cv240 AJB (KSC)

ORDER DENYING PLAINTIFF'S
EX PARTE APPLICATION TO
SERVE DEFENDANTS MICHAEL
MCDEVITT, JEAN-PIERRE
RADTKE, AND LUIS ANTONIO
VENEGAS BY PUBLICATION;
AND DEFENDANT PREMIERE
CAPITAL ESCROW BY SERVING
THE CALIFORNIA SECRETARY
OF STATE

(Doc. No. 87)

On March 18, 2013, Plaintiff Marcella Rose ("Plaintiff") filed an *ex parte* application requesting leave to serve Defendants Michael McDevitt ("McDevitt"), Jean Pierre-Radtke ("Radtke"), and Luis Antonio Venegas ("Venegas") by publication; and Defendant Premiere Capital Escrow, Inc., a California corporation ("Premiere") by effectuating service on the California Secretary of State. (Doc. No. 87.) Neither McDevitt, Radtke, Venegas, nor Premiere have appeared in the action.¹ For the reasons set forth below, the

¹ Defendant Chad Hagobian ("Hagobian") has already appeared in the action, (Doc. Nos. 19, 59), and proof of service of the operative Third Amended Complaint on Defendant Seamless Financial Corporation Inc., was filed on March 18, 2013, (Doc. No. 86).

1 Court DENIES without prejudice Plaintiff's motion to serve McDevitt, Radtke, and
 2 Venegas by publication, and DENIES without prejudice Plaintiff's motion to serve
 3 Premiere by effectuating service on the California Secretary of State. Additionally, the
 4 Court GRANTS Plaintiff a final ninety-day (90) extension of time to effectuate service on
 5 McDevitt, Radtke, Venegas, and Premiere.

6 **BACKGROUND**

7 **I. Procedural History**

8 Plaintiff Marcella Rose is a 91-year-old woman residing in San Diego, California.
 9 The present action was originally filed on December 29, 2010 in state court against
 10 defendants Wachovia, Wells Fargo, Seamless, McDevitt, and Hagobian. (Doc. No.1.)
 11 The complaint contained six causes of action: (1) violation of the Real Estate Settlement
 12 Procedures Act, 12 U.S.C. § 2605 ("RESPA"); (2) violation of the federal Fair Debt
 13 Collection Practices Act, 15 U.S.C. § 1692 ("FDCPA"); (3) violation of the California
 14 Rosenthal Fair Debt Collection Practices Act, Cal. Civ. Code §§ 1788 *et seq.* ("Rosenthal
 15 Act"); (4) unfair competition under California Business and Professions Code §§ 17200
 16 *et seq.* ("UCL"); (5) common law fraud and deceit; and (6) violation of the Elder Abuse
 17 and Dependent Adult Civil Protection Act, California Welfare & Institutions Code §
 18 15610.30 ("Elder Abuse Act"). The first, second, and third causes of action were alleged
 19 solely against Wells Fargo, whereas the remaining state law causes of action were alleged
 20 against all Defendants. (Doc. No. 1.)

21 On February 4, 2011, Defendants removed the action to federal court on the basis
 22 of federal question jurisdiction and supplemental jurisdiction over the related state law
 23 claims. (Doc. No. 1.) On February 11, 2011, Defendant Wells Fargo filed a motion to
 24 dismiss the complaint, (Doc. No. 2), which was subsequently denied as moot after
 25 Plaintiff filed a First Amended Complaint ("FAC") on March 4, 2011. (Doc. No. 7.)
 26 Thereafter, on March 18, 2011, Wells Fargo moved to dismiss Plaintiff's FAC. (Doc. No.
 27 13.) While Wells Fargo's motion to dismiss was pending, Wells Fargo and Wachovia
 28 entered into a good faith settlement with Plaintiff. (Doc. No. 32.) The settlement was

1 approved by the Court on March 2, 2012, (Doc. No. 50), and the federal causes of action
2 alleged against Wells Fargo were subsequently dismissed, (Doc. No. 56).

3 Plaintiff filed a Second Amended Complaint (“SAC”) on April 2, 2012. (Doc. No.
4 53.) The SAC alleged four causes of action: (1) violation of the Elder Abuse Act; (2)
5 common law fraud and deceit; (3) breach of fiduciary duty; and (4) unlawful, unfair, and
6 deceptive practices under the UCL.² On May 1, 2012, Defendant Hagobian filed a
7 motion to dismiss, (Doc. No. 59), and on June 1, 2012, Plaintiff filed a motion to remand,
8 (Doc. No. 61). On August 1, 2012, Plaintiff filed a motion for an order extending time to
9 serve Defendants Seamless, McDevitt, Radtke, Venegas, and Premiere, and for an order
10 permitting limited expedited discovery of Defendants’ locations. (Doc. Nos. 69, 70.) On
11 August 23, 2012, while Plaintiff’s motion for expedited limited discovery was pending,
12 Magistrate Judge Crawford issued an order granting a ninety-day (90) extension of time
13 to serve the non-appearing Defendants. (Doc. No. 72.) On September 10, 2012, the
14 Court issued an order denying Plaintiffs’ motion to remand, (Doc. No. 61), and granting
15 Defendant Hagobian’s motion to dismiss the SAC, (Doc. No. 59).

16 On October 10, 2012, Plaintiff filed the operative Third Amended Complaint
17 (“TAC”). (Doc. No. 74.) The TAC contains four causes of action: (1) violation of the
18 Elder Abuse Act; (2) common law fraud and deceit; (3) breach of fiduciary duty; and (4)
19 unlawful, unfair, and deceptive practices under UCL.³ On December 4, 2012, Judge
20 Crawford granted Plaintiff’s *ex parte* application for an order permitting limited expe-
21 dited discovery to obtain the contact information for Defendants Seamless, McDevitt,
22 Radtke, Venegas, and Premiere. (Doc. No. 79.) Thereafter, the Court denied Defendant
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24 ² The SAC named Seamless, McDevitt, Hagobian, Radtke, Premiere, and Venegas
25 as Defendants. Defendants Radtke, Premiere, and Venegas were added as additional
26 Defendants by Plaintiff for the first time in the SAC. A summons for the SAC was issued
27 on April 3, 2012. (Doc. No. 54.) Defendant Hagobian was served and appeared.

28 ³ The first and second causes of action are asserted against Defendants Seamless,
McDevitt, Radtke, Venegas, and Does 1-100; the third cause of action is asserted against
Premiere, Seamless, and Does 1-100; and the fourth cause of action is asserted against all
Defendants. (Doc. No. 74.)

Hagobian's motion to dismiss the TAC and motion for sanctions, and ordered Hagobian to respond to the TAC within thirty-days (30). (Doc. No. 84.) Hagobian filed an answer to the TAC on February 1, 2013. (Doc. No. 85.) Proof of service of the TAC on Defendant Seamless was filed on March 18, 2013. (Doc. No. 86.)

II. Factual Background

This action concerns claims for elder abuse, fraud, and deceitful business practices by all Defendants. (Doc. No. 74.) Specifically, Plaintiff alleges that Defendants conspired to fraudulently induce her to refinance her home, and as a result, she paid \$27,000 to enter into a loan that she neither understood nor could afford. (*Id.* at 1-2.) Plaintiff further alleges that Defendants solicited her to refinance her home, falsified her loan application, misrepresented her income for the loan application, forged her signature, and ultimately provided her with a deceptively devised financial product. (*Id.* at 5-6.) Consequently, Plaintiff was eventually unable to pay the monthly loan payments and was unsuccessful at arranging further modifications to her loan. (*Id.* at 6-7.) After a foreclosure proceeding was begun against Plaintiffs' home, a short sale was arranged at the suggestion of Wachovia. (*Id.* at 7.) As alleged, Plaintiff lost her home and all of her savings as a result of Defendants' wrongdoing. (*Id.*)

DISCUSSION

Plaintiff's instant *ex parte* application contends she has been unable to confirm service of the summons and operative TAC on Defendants McDevitt, Radtke, Venegas, and Premiere despite reasonably diligent efforts. Accordingly, Plaintiff seeks leave to serve Defendants McDevitt, Radtke, and Venegas by publication; and Defendant Premiere by serving the California Secretary of State. The Court addresses each request in turn.

I. Plaintiff's Section 415.50 Motion: "Service by Publication"

Federal Rule of Civil Procedure 4 provides that service of the summons and complaint may be effected in any judicial district of the United States pursuant to the law

1 of the state in which the district court is located. Fed. R. Civ. P. 4. The California Code
2 of Civil Procedure permits service by publication “as a last resort.” *Donel Inc. v.*
3 *Badalian*, 87 Cal. App. 3d 327, 332 (Cal. Ct. App. 1978). Thus, “[p]ersonal service
4 remains the method of choice under the statutes and the constitution . . . [and] when
5 substituted or constructive service is attempted, strict compliance with the letter and spirit
6 of the statutes is required.” *Olvera v. Olvera*, 232 Cal. App. 3d 32, 41 (Cal. Ct. App.
7 1991).

8 Pursuant to California Code of Civil Procedure Section 415.50(a)(1), service by
9 publication is permitted only “if upon affidavit it appears to the satisfaction of the court
10 in which the action is pending that . . . [a] cause of action exists against the party upon
11 whom service is to be made or he or she is a necessary or proper party to the action.”
12 (emphasis added). In other words, Section 415.50(a)(1) requires that the plaintiff provide
13 independent evidentiary support, in the form of a sworn statement of facts, for the
14 existence of a cause of action against each defendant whom service by publication is
15 requested. *See Harris v. Cavasso*, 68 Cal. App. 3d 723, 726 (Cal. Ct. App. 1977)
16 (holding that Section 415.50(a)(1) requires “an affidavit containing a statement of some
17 fact which would be legal evidence, having some appreciable tendency to make the [the
18 cause of action] appear, for the Judge to act upon before he has any jurisdiction to make
19 the order” authorizing service by publication).

20 For example, in *City and County of San Francisco v. Upp*, No. A123528, 2011 WL
21 1197524 (Cal. App. 1st Dist. Mar. 30, 2011), the court affirmed a trial court order
22 vacating a default judgment because the declaration supporting service by publication
23 was legally insufficient. The City’s declaration supporting service by publication, which
24 was signed by a deputy attorney for the City, contained a “short paragraph” stating that
25 the defendant’s property was a nuisance and that it had unsafe parapet walls. *Id.* at *5.
26 The court in *Upp* stated that these “conclusory” statements were “insufficient to support a
27 cause of action,” and noted that the declaration failed to explain how the deputy city
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1 attorney, who signed the declaration, had personal knowledge of the condition of the
2 parapet walls. *Id.*

3 Here, Plaintiff attached two declarations and multiple exhibits in support of the
4 instant *ex parte* application—a declaration from Malinda R. Dickenson (“Dickenson
5 Declaration”), Plaintiff’s counsel of record; and a declaration from Deborah M. Perlstein
6 (“Perlstein Declaration”), an employee of Major’s & Fox, also Plaintiff’s counsel of
7 record. (Doc. No. 87.) However, neither the Dickenson Declaration nor the Perlstein
8 Declaration make any mention of any facts that could support a cause of action against
9 Defendants McDevitt, Radtke, Venegas, or Premiere. The *ex parte* application is
10 similarly deficient, as it simply reiterates the attempts at service contained within both
11 declarations. Accordingly, the Court finds the Dickenson Declaration, the Perlstein
12 Declaration, and the *ex parte* application “devoid of any facts from which the trial court
13 could draw the conclusion that a cause of action existed against [any of the] defendants.”
14 *Harris*, 68 Cal. App. 3d at 726.

15 Additionally, California Code of Civil Procedure Section 415.50(a) requires that
16 the affidavit supporting service by publication clearly specifies how “the party to be
17 served cannot with *reasonable diligence* be served in another manner specified in this
18 article.” (emphasis added). This statutory requirement is supported “by notions of fair
19 play and justice embodied in the concept of due process of law” and must be strictly
20 complied with “before resorting to the fictional notice afforded by publication.” *Donel*,
21 87 Cal. App. 3d at 332. Citing the Judicial Council Comment to Section 415.50, the
22 court in *Kott v. Superior Court*, 45 Cal. App. 4th 1126 (Cal. Ct. App.1996), stated that:

23 The term ‘reasonable diligence’ takes its meaning from the former law: it
24 denotes a *thorough, systematic investigation* and inquiry conducted in good
25 faith by the party or his agent or attorney. A *number of honest attempts* to
26 learn defendant’s whereabouts or his address by inquiry of relatives, friends,
27 and acquaintances, or of his employer, and by investigation of appropriate
28 city and telephone directories, the voters’ register, and the real and personal
property index in the assessor’s office, near the defendant’s last known
location, are generally sufficient. These are likely sources of information,

1 and consequently must be searched *before resorting to service by publica-*
 2 *tion.*

3 *Id.* at 1137 (citing Cal. Judicial Council Com., 14 West’s Ann. Code Civ. Proc. (1973
 4 ed.)) (emphasis added). Therefore, the sworn statement supporting the request for service
 5 by publication must detail the necessary efforts to serve the defendants by other means.
 6 *See Sanford v. Smith*, 11 Cal. App. 3d 991, 999 (Cal. Ct. App. 1970) (“A test of the
 7 sufficiency of the affidavit is whether it is so clear and certain that a charge of perjury
 8 could be sustained if its specified facts showing diligence are false.”).

9 Here, the Court finds Plaintiff clearly specified how McDevitt could not be served
 10 with reasonable diligence through means other than service by publication, but failed to
 11 clearly articulate reasonable diligence was employed to serve Radtke and Venegas before
 12 resorting to service by publication. For example, Plaintiff alleges she made multiple
 13 attempts to serve McDevitt. As stated in the Dickenson Declaration, service on McDevitt
 14 was attempted: (1) on or about February 11, 2011, at 655 North Central Avenue, 17th
 15 Floor, Glendale, California; (2) on or about February 9, 2011 through March 9, 2011, at
 16 1720 Scott Road, Apt 112; and (3) on or about May 12, 2011, at 433 North Camden
 17 Drive, 6th Floor, Beverly Hills. (Doc. No. 87, Dickenson Decl. ¶8.) The first two
 18 attempts were unsuccessful, whereas Plaintiff believes substituted service was effectuated
 19 on the third attempt because the package was left with a “Jane Doe,” who was listed as
 20 the receptionist for the building. (Doc. No. 20.)

21 Moreover, the Perlstein Declaration states that service on McDevitt was attempted
 22 by mailing the SAC, notice of lawsuit, and request for waiver of service: (1) on June 22,
 23 2012, to 311 E. Valencia Ave., Apt. D, Burbank, California 91502-3372; and (2) on July
 24 9, 2012, to 9107 Wilshire Blvd., Ste. 450, Beverly Hills, California 90210. (Doc. No. 87,
 25 Perlstein Decl. ¶¶ 4, 5.) The second attempt was returned on July 15, 2012 as “RTS” and
 26 nothing was returned regarding the first attempt. (*Id.*) Thereafter, in response to attempts
 27 to serve McDevitt with the TAC, Malinda Dickenson received two phone calls, wherein
 28 McDevitt alleged he “did not cheat anyone out of money,” argued he was not the right

1 “McDevitt,” and requested Dickenson return his call to clear up the misunderstanding.
2 (Doc. No. 87, Ex. 7.) Although Dickenson attempted to call “McDevitt” back to confirm
3 that he was not in fact the appropriate defendant, “McDevitt” never returned her call.
4 (Doc. No. 87, Dickenson Decl. ¶ 9.) Accordingly, based on Plaintiff’s *ex parte* applica-
5 tion and declaration and exhibits attached thereto, the Court finds Plaintiff employed
6 reasonably diligent efforts to serve McDevitt by other means before requesting leave to
7 effectuate service by publication.

8 In comparison, the Court finds Plaintiff’s single efforts to serve Radtke and
9 Venegas insufficient. With respect to Defendant Radtke, Plaintiff attempted service by
10 mailing the summons, TAC, notice of lawsuit, and request for waiver of service on
11 February 26, 2012, to 5655 Lindero Canyon Road, #626, Westlake, California 91362.
12 (Doc. No. 87, Perlstein Decl. ¶ 2.) This was the address provided by Defendant
13 Hagobian and confirmed by an internet search conducted on the California Department of
14 Real Estate website. (Doc. No. 87, Dickenson Decl. ¶¶ 2, 4, Exs. 1, 3.) The documents
15 were not returned as undeliverable and no response has been provided. Plaintiff has not
16 thereafter attempted further service on Radtke. With respect to Defendant Venegas,
17 Plaintiff attempted service by mailing the summons, TAC, notice of lawsuit, and request
18 for waiver of service on February 26, 2012, to 5777 W. Century Blvd., Ste. 665, Los
19 Angeles, California 90045. (Doc. No. 87, Perlstein Decl. ¶ 3.) Defendant Hagobian was
20 not able to identify an address for Defendant Venegas, but this was the address listed for
21 Venegas on the California Department of Real Estate website. (Doc. No. 87, Dickenson
22 Decl. ¶ 4, Ex. 3.) The documents were not returned as undeliverable and no response has
23 been provided. Plaintiff has not thereafter attempted further service Venegas.

24 Therefore, although Plaintiff documented the singular attempt to serve Defendant
25 Radtke and Defendant Venegas, and engaged in diligent efforts to locate such Defen-
26 dants, the Court finds Plaintiff failed to satisfy the “reasonable diligence” standard in
27 effectuating service of process. *See e.g., Donel*, 87 Cal. App. 3d at 332 (finding insuffi-
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cient due diligence when only one method employed); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950) (finding that “process which is a mere gesture is not due process”); *Watts v. Crawford*, 10 Cal. 4th 743, 749 n. 5 (Cal. 1995) (finding that “[i]f a defendant’s address is ascertainable, a method of service superior to publication must be employed, because constitutional principles of due process of law, as well as the authorizing statute, require that service by publication be utilized only as a last resort”); *Flores v. Kmart Corp.*, 202 Cal. App. 4th 1316, 1330 (Cal. Ct. App. 2012) (finding that if a creditor’s identity is known or reasonably ascertainable, service by publication does not comply with the Fourteenth Amendment due process clause notice requirement—actual notice is constitutionally required); *Stafford v. Mach*, 64 Cal. App. 4th 1174, 1182, (Cal. Ct. App. 1998) (finding that after six attempts at personal service, “drop service” was appropriate). Accordingly, even though Plaintiff engaged in “reasonably diligent” efforts to serve Defendant McDevitt, Plaintiff’s request is DENIED as to Defendants McDevitt, Radtke, and Venegas because Plaintiff failed to comply with the requirements set forth by Section 415.50(a)(1) as to each Defendant. *See Harris*, 68 Cal. App. 3d at 726; *Stafford*, 64 Cal. App. 4th at 1182.

II. Plaintiff’s Section 2011(b) Motion: “Service on the California Secretary of State”

California Code of Civil Procedure Section 416.10 governs service on corporations. *See Gibble v. Car-Lene Research, Inc.*, 67 Cal. App. 4th 295, 303 (Cal. Ct. App. 1998). Under Section 416.10, a corporation can be validly served through four basic categories of individuals: “(1) a designated agent for service of process, (2) enumerated officers and other authorized agents of the corporation; (3) a cashier or assistant cashier of a banking corporation; and (4) where the party attempting service cannot with reasonable diligence serve an individual in any other category, the Secretary of State as provided by Corporations Code” Sections 1701, 1702, 2110, or 2111. *Id.* at 303-04. Moreover, California Corporations Code Section 2011 governs causes of action against

1 dissolved corporations, and dictates acceptable methods of service of process on such
2 entities. Section 2011(b) provides:

3 Summons or other process against such a corporation may be served by
4 delivering a copy thereof to an officer, director or person having charge of
5 its assets or, if no such person can be found, to any agent upon whom
6 process might be served at the time of dissolution. If none of such persons
7 can be found with due diligence and it is so shown by affidavit to the
8 satisfaction of the court, then the court may make an order that summons or
9 other process be served upon the dissolved corporation by personally
10 delivering a copy thereof, together with a copy of the order, to the Secretary
11 of State or an assistant or deputy secretary of state. Service in this manner is
12 deemed complete on the 10th day after delivery of the process to the Secretary of State.

9 Cal. Corp. Code § 2011, subdivision (b); *see also Penasquitos, Inc. v. Super. Ct.*, 53 Cal.
10 3d 1180, 1189–90 (Cal. Ct. App. 1991). The Court interprets “due diligence” in Section
11 2011(b) to require the same efforts to serve by other means as California Code of Civil
12 Procedure § 415.50.

13 Here, Plaintiff’s Section 2011(b) motion seeks an order authorizing Plaintiff to
14 serve Defendant Premier by effectuating personal service on the California Secretary of
15 State. The Perlstein Declaration states that Plaintiff attempted service on Premier at
16 23822 W. Valencia Blvd., Ste. 301, Valencia, California 91355-5350, but was notified
17 that “Denny & Associates” is now the business occupant of that location. (Doc. No. 87,
18 Perlstein Decl., ¶ 6.) Plaintiff did not state what date service was attempted on Premier.
19 Therefore, although Plaintiff may effectuate service on Premier by serving an “officer,
20 director, or person having charge of its assets” pursuant to Section 2011(b), the Court
21 finds, as further articulated above, that Plaintiff’s single efforts to serve Venegas—the
22 principal of Premier—are insufficient to meet the “due diligence” standard required under
23 this Section. Accordingly, Plaintiff’s *ex parte* application to serve Defendant Premier by
24 serving the California Secretary of State is DENIED.

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27 CONCLUSION

1 For the reasons set forth above, the Court DENIES without prejudice Plaintiff's *ex*
2 *parte* application to serve Defendants McDevitt, Radtke, and Venegas by publication; and
3 serve Defendant Premier by effectuating service on the California Secretary of State.
4 (Doc. No. 87.) However, the Court also GRANTS Plaintiff a final ninety-day (90)
5 extension to serve the above named Defendants. *See* Fed. R. Civ. P. 4(m).

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9 IT IS SO ORDERED.

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11 DATED: March 26, 2013

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13 Hon. Anthony J. Battaglia
14 U.S. District Judge
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